

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
POWERTECH (USA) INC.,) Docket No. 40-9075-MLA
) ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium Recovery)
Facility))

Oglala Sioux Tribe’s Rebuttal Statement

In accordance with 10 C.F.R. § 2.1207 and this Board’s Order of June 2, 2014, Intervenor Oglala Sioux Tribe (“OST” or “Tribe”) hereby submits this Rebuttal Statement on Contentions 1A, 1B, 2, 3, 4, 6, and 9 as previously admitted in this proceeding.

INTRODUCTION AND SUMMARY

Powertech and NRC Staff have filed Opening Statements attempting to justify the lack of critical and necessary information in the Final Supplemental Environmental Impact Statement (“FSEIS”) for the Dewey-Burdock Project approvals. As detailed in the Tribe’s Opening Statement, the FSEIS fails to comply with the requirements of the National Environmental Policy Act (“NEPA”), as implemented through NRC and Council on Environmental Quality (“CEQ”) regulations. While both Powertech and NRC Staff assert full compliance with NEPA, a careful review of their arguments demonstrate that they both misapprehend the requirements of NEPA, confuse NEPA’s requirements with those under the National Historic Preservation Act (“NHPA”), or ignore critical facts evident in the record. As a result, and as described in detail herein, this Board should vacate the FSEIS, the NRC Staff’s Record of Decision, and the license and remand the entire matter back to NRC Staff for further analysis and review as required by law.

Contention 1A: Failure to Meet NEPA Requirements Regarding Protection of Historical and Cultural Resources.

NRC Staff admits that in addition to the Powertech application materials, it used only four reports (out of seven tribes that assessed the site) to assess the impacts of the project to cultural resources. This approach lacks any of the hallmarks of a competent scientific inquiry. The NRC Staff concedes that the FSEIS identifies no methodology associated with how these reports were prepared, how the information that contributed to these reports was gathered, why the FSEIS made use of only these four reports (when seven tribes conducted reviews), or why NRC Staff completely excluded from its analysis any review or survey of the site by any members of the Oglala Sioux Tribe, or it appears, any Lakota Sioux at all, for which the area constitutes ancestral homeland. This lack of scientific assessment is even more glaring when it is considered that none of the tribes that submitted reports were Sioux tribes at all.¹

NRC Staff attempts to counter the Tribe's argument regarding a lack of adequate scientific methodology by claiming that the non-Sioux tribes used "traditional transect survey methods" and "global positioning system equipment to record sites of significance to their tribes." NRC Staff Opening Statement at 19.² In recognition of the inadequate NEPA analysis, Powertech and NRC Staff submit testimony that attempts to provide some of the information

¹ The FSEIS identifies the basis for the NRC Staff's cultural resources analysis as deriving from reports submitted only by the Northern Arapaho Tribe, Northern Cheyenne Tribe, Cheyenne and Arapaho Tribes of Oklahoma) and a truncated report provided by the Crow Nation. FSEIS at 3-87. Powertech flatly admits the lack of any inclusion of any tribal interests in its application materials survey, inappropriately relying on NHPA regulations (Contention 1A is a NEPA-based contention) to argue that the applicant "has no responsibility for or authority to enter into consultations with the federally recognized tribes." Powertech Opening Statement at 29. As discussed herein and in the Tribe's Opening Statement, the absence of any Lakota peoples in this list confirms that the NEPA analysis is unreliable.

² The NRC Staff's choice of words in this argument is telling – referencing these tribes' recordation of sites "significant to their tribes." This amounts to an admission that nowhere has NRC Staff incorporated information specific to the cultural knowledge of any Sioux tribe.

lacking in the NEPA process as to the methodology purportedly used during the survey and included in the Powertech application materials. Powertech Opening Statement at 30; NRC Staff testimony Ex. NRC-001 at 5-6. However, the testimony fails to demonstrate how or where this information was ever presented in the FSEIS, as required. Powertech also candidly admits “that identifying religious or culturally significant properties in a project area is entirely reliant of the Tribes themselves and the special expertise of the Tribal cultural practitioners.... Simply put, entities such as NRC or Powertech are not equipped with the Tribe-specific knowledge and traditions to adequately instruct a specific Tribe using ‘proper scientific expertise’ on this subject.” Powertech Opening Statement at 34. Yet, the record and testimony contains no evidence that NRC Staff successfully equipped itself or acquired the necessary resources to meet NRC’s NEPA duties involving religious and cultural resources.

NRC Staff and Powertech assert that the Tribe has never identified any components of an appropriate methodology. NRC Staff Opening Statement at 19-20; Powertech Opening Statement at 34. However, as discussed in the declarations of Michael CatchesEnemy (Ex. OST-014) and Wilmer Mesteth (OST-015), the February 5, 2014 letter submitted to the NRC Staff by OST President Bryan Brewer, along with the comments submitted throughout the cultural review process by the Standing Rock Sioux Tribe (Exs. NRC-016, OST-016), any effort to assess the cultural impacts to the Sioux tribes, including the Oglala Sioux Tribe, must take account of the unique historic knowledge and cultural experience of the Lakota Sioux people.

Powertech goes so far as to make the bold argument that the Tribe is to blame for NRC Staff’s lack of any incorporation in its FSEIS of any survey reports that included participation by anyone with Sioux cultural experience. Powertech Opening Statement at 34. Attempting to blame the Sioux tribes for NRC Staff’s failure to “equip” itself with the necessary expertise to

carry out NRC's NEPA duties is disingenuous at best. As explained in depth the Opening Statement and in the context of Contention 1B *infra*, various Sioux tribes made exhaustive attempts to participate in the cultural resources survey of the mine site, but were rebuffed, and ultimately ignored altogether, when they raised serious concerns with the methodology proposed for ensuring the cultural resource impacts were adequately assessed.

Having failing to equip themselves with the necessary resources and expertise, NRC Staff and Powertech are thus forced to rely heavily on "a Level III archeological survey of the Dewey-Burdock site as part of its initial application." NRC Staff Opening Statement at 18; *see also* Powertech Opening Statement at 30-33. However, this is the same analysis submitted by Powertech as part of its initial application materials, and for which NRC Staff expressly committed to supplementing based on the deficiencies in the analysis, including those identified in the Declaration of Wilmer Mesteth (Ex. OST-015 at 2-4, ¶¶ 10-20).

Indeed, as early as the DSEIS stage, NRC Staff opted to not defend the Level III survey as sufficient, instead committing to conduct additional surveys and presenting them for public review in a NEPA document:

the Staff is currently consulting with numerous Indian tribes to obtain additional information on historic properties that may be affected by the Dewey-Burdock Project. The analysis in the DSEIS is therefore based on archeological survey results Powertech submitted as part of its application, and this information is not new. As the Staff explained when it issued the DSEIS, however, it is working to facilitate a field survey of the Dewey-Burdock site in order to obtain additional information on historic properties. When the survey is complete, the Staff will supplement its analysis in the DSEIS and circulate the new analysis for public comment. If the Intervenor disagree with the Staff's analysis, they will be able to submit comments or contentions on the supplement. There is, however, no basis for admitting the Intervenor's contentions at this time.

NRC Staff's Answer to Contentions on Draft Supplemental Environmental Impact Statement (March 7, 2013) at 13.

As part of this effort to conduct additional analyses, NRC Staff embarked on an *ad hoc* process that proposed to use a private contractor to work alongside Sioux tribes and tribal interests instead of developing a scientifically valid survey necessary to adequately assess the cultural resources in the area. Unfortunately, when the Tribes objected to the proposed methodology and process for conducting the *ad hoc* survey, instead of working through those disagreements and coming to consensus, NRC Staff simply abandoned the effort – instead opting for a system where any tribe that desired was able to conduct its own survey under its own terms and without any of the institutional controls or systematic protocols in place, and without agreement with the tribes regarding the scope or nature of the analysis. *See* Exs. OST-016 and OST-017 (letters from Standing Rock Sioux Tribe and Oglala Sioux Tribe objecting to methodology).

The FSEIS discusses the NRC Staff's unsuccessful attempt to secure a scientifically-valid independent cultural survey of the project area, but shows that instead of having such a survey completed, NRC Staff abandoned that approach and did not pursue it any further. FSEIS at 1-23 to 24. Rather than equipping itself with the resources and protocol for a survey that included proper scientific expertise, proper methodology, and the participation of the tribal representatives, NRC Staff instead simply invited tribes to visit the site for themselves, making no provision for methodologies or scope. Several tribes, including the Oglala Sioux Tribe, rejected the terms of the NRC Staff-directed survey as improper and insufficient. FSEIS at 1-25. Instead of resolving these issues involving resources, expertise, and methodology, NRC Staff simply charged forward, collecting *ad hoc* information from the small selection of tribes that did participate in the exercise and deemed it a sufficient basis on which to finalize the incomplete FSEIS.

NRC Staff and Powertech continually argue that NRC Staff complied with NEPA “by making a good-faith attempt to identify cultural resources.” NRC Staff Opening Statement at 18; 19-20 (“the Staff had to make a ‘good faith and reasonable effort’ at identifying sites eligible or potentially eligible for the [National Register of Historic Places].”); 20 (“The Staff also complied with NEPA by making repeated attempts to obtain information on cultural resources and by including mitigation measures in the Programmatic Agreement that will help avoid or limit impacts to any unidentified resources.”); Powertech Opening Statement at 34, 37³. However, this argument evidences NRC Staff’s and Powertech’s ongoing, and fundamental, error of confusing the requirements of the National Historic Preservation Act and the National Environmental Policy Act.⁴

NEPA requires more than a “reasonable and good faith effort” – rather, NEPA, among other things, requires a “hard look” at impacts. The caselaw supports the independent review of NEPA and NHPA compliance where “compliance with the NHPA ‘does not relieve a federal agency of the duty of complying with the impact statement requirement ‘to the fullest extent possible.’”’” Lemon v. McHugh, 668 F. Supp. 2d 133, 144 (D.D.C. 2009) *quoting* Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. Idaho 1982) *quoting* 42 U.S.C. § 4332.

NRC Staff furthers this confusion between the NHPA and NEPA requirements in arguing that the “ACHP’s guidance on identifying historic sites undermines the Intervenor’s arguments,

³ Indeed, a primary basis for Powertech’s entire argument under Contention 1A is testimony from a Dr. Lynne Sebastian, which relates virtually entirely to compliance with the NHPA section 106 consultation process – and no discussion whatsoever of NEPA requirements as they relate to the “hard look” standard.

⁴ NRC Staff extends the error in its attempts to rebut the Tribe’s NEPA arguments by claiming that “the ACHP guidance on identifying historic sites undermines the Intervenor’s arguments, because it does not direct any particular methodology for a field survey, nor does it even require an agency to arrange for the type of field survey that the Staff facilitated in this case.” NRC Staff Opening Statement at 19.

because it does not direct any particular methodology for a field survey....” NRC Staff Opening Statement at 19; *see also* Powertech Opening Statement at 34 (citing NHPA’s “reasonable and good faith effort” standard as the sole operative legal test for purposes of Contention 1A).

However, the ACHP’s guidance on the NHPA is in no way determinative of the NRC Staff’s obligations under NEPA. NEPA regulations specifically require that:

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. **They shall identify any methodologies used** and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

40 C.F.R. § 1502.24 - Methodology and scientific accuracy (emphasis added). *See also* 10

C.F.R. Part 51, Appendix A to Subpart A (discussion placement of description of methodology).

This type of critical detail regarding methodology is fundamental to the relevant “hard look” test.

Thus, NEPA requires NRC Staff to ensure scientific integrity and describe its methodologies within each NEPA document. Where NRC Staff was not equipped to carry out NRC’s NEPA duties, NRC Staff’s and Powertech’s attempts to push the burden of demonstrating an acceptable methodology on to the Tribe should be squarely rejected by the Board.⁵

In this case, the basic “hard look” standard has not been met absent a description in the FSEIS⁶ of the methodology employed to assess cultural impacts along with an analysis of the

⁵ NRC caselaw clearly establishes that the burden of demonstrating compliance with NEPA falls on NRC Staff. Dubois v. U.S. Dept. Of Agric., 102 F.3d 1273, 1291 (1st Cir. 1996); Friends of the Clearwater v. Dombeck, 222 F.3d 552, 559 (9th Cir. 2000). *See further* Friends of the River v. FERC, 720 F.2d 93, 123 (D.C. Cir. 1983) (stating that “NEPA expressly places the burden of compiling information on the agency so that the public and interested government departments can conveniently monitor and criticize the agency’s action.”) (internal citations omitted).

⁶ NRC Staff’s and Powertech’s attempts to rehabilitate the NRC Staff’s failure to provide the required information on methodology in the FSEIS through its post-hoc written testimony of witnesses as to a purported methodology should be rejected by this Board. As NEPA regulations and the caselaw make clear, information provided after a NEPA document is finalized and

cultural impacts to the Sioux. Critical to an understanding of this argument is that the area proposed for mining is a historic and pre-historic cultural site for the Sioux people – meaning that a large percentage, if not all, of the cultural sites are specific to Sioux culture, such that any analysis that fails to account for Sioux cultural impacts is necessarily deficient. *See* Ex. OST-015 (Declaration of Wilmer Mesteth) at 1-2 (“The lands encompassed by the Powertech proposal are within the Territory of the Great Sioux Nation, which includes the band of the Oglala Lakota (Oglala Sioux Tribe) aboriginal lands. As a result, the cultural resources, artifacts, sites, etc., belong to the Tribe. ... Since there are cultural resources identified in the license application, and there may well be more that only the Tribe can identify and ensure that they are properly protected, the Tribe has a protected interest here. Any harm done to these artifacts, perhaps because the Applicant did not properly judge the significance of certain artifacts or other resources, will be an injury to the Tribe, caused by the actions of the Applicant, and condoned by the NRC, the Tribe’s trustee. ”); Ex. OST-014 (Declaration of Michael CatchesEnemy) at 1-2 (same). As a result, NRC Staff’s and Powertech’s repeated reliance on other tribes that have conducted surveys on the proposed mine site cannot fill this substantial gap in the FSEIS analysis.

NRC Staff try to confuse the Board by turning this argument on its head, asserting that by the Oglala Sioux Tribe’s repeated insistence that the cultural resource survey methodology include surveyors with expertise in Sioux culture and experience, the Tribe has somehow undermined its argument that NRC Staff have not satisfied its NEPA duties. NRC Staff Opening Statement at 19, n.60. Nothing could be further from the truth. The fact is that the Oglala Sioux

outside of the NEPA process cannot be used to fix problems with the NEPA process itself. *See Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983) (“[U]nless a document has been publicly circulated and available for public comment, it does not satisfy NEPA’s EIS requirements.”).

Tribe has been entirely consistent on this point throughout the NRC Staff's analysis of the cultural impacts. *See* Ex. NRC-064 (November 5, 2012 letter from OST President John Yellow Bird Steele) at 2 ("It is self-evident that each tribe will have expertise in recognizing its own sacred sites. The Oglala Sioux Tribe strongly objects to [NRC Staff's] use of persons without any expertise in Sioux [traditional cultural properties] to identify Sioux [traditional cultural properties]."; Ex. OST-012 (Statement of Contentions of the Oglala Sioux Tribe Following Issuance of the FSEIS, Exhibit) at 132-133 (February 5, 2014 Letter from OST President Bryan V. Brewer to NRC Staff)("As you know, the Oglala Sioux Tribe has attempted to maintain a high level of involvement in the National Historic Preservation Act (NHPA) Section 106 consultation process through our Tribal Historic Preservation Office (OSTHPO), as well as the preparation of the National Environmental Policy Act (NEPA) environmental impact statement. Unfortunately, these processes have not been conducted in a manner that complies with the letter or spirit of either the NHPA or NEPA, resulting in the effective exclusion of several of the most impacted Tribes to which ascribe this proposed project area as traditional homelands. ... We request that NRC revisit its NEPA and NHPA compliance on this proposed project in order to fulfill its prior commitments, and legal obligations, to provide meaningful opportunities for the OSTHPO participation within both the NHPA consultation and NEPA review.... As repeatedly communicated in prior correspondence by the Oglala Sioux Tribe and others, while the Tribe remains willing and able to participate in the process, it must be done in a credible manner, using proper methodologies and expertise. ... To date these cultural resources surveys, as well as to the ones completed prior by archaeologists are not complete and the NRC and Powertech efforts to date have not provided sufficient resources nor incorporated sufficient THPO involvement to result in a credible product.").

NRC Staff and Powertech attempt to contort and simplify the Tribe's argument under Contention 1A by framing it primarily as a dispute as to whether it was proper for the agency to separate the NEPA and NHPA analyses. *See* NRC Staff Opening Statement at 20; Powertech Opening Statement at 27-28. In this way, NRC Staff and Powertech misinterpret the Tribe's NEPA arguments raised in Contention 1A. While the Tribe believes this choice to "de-couple" the NEPA and NHPA reviews was severely counter-productive, the Tribe does not contend that such a decision forms the basis for an independent legal claim under NEPA. Rather, this decision served to handicap the NEPA process and, as discussed herein, ultimately resulted in a NEPA document that was completed before the requisite "hard look" was completed. Instead of addressing the fact that "NRC or Powertech are not equipped with the Tribe-specific knowledge and traditions to adequately instruct a specific Tribe using 'proper scientific expertise' on this subject," the FSEIS relied on a cultural resources review that completely and intentionally excluded the only parties with the ability to ensure competence – the Sioux. Powertech Opening Statement at 34.

As described in the Tribe's Opening Statement, Contention 1A addresses NRC Staff's failure to adequately analyze cultural and historic resources under NEPA, in an environmental document before the license issues. Oglala Sioux Tribe Opening Statement at 9. NRC Staff argues that it complied with NEPA by finalizing its Programmatic Agreement prior to signing a Record of Decision ("ROD") for the project, which NRC Staff claims is its Final NEPA document. NRC Staff Opening Statement at 21 ("As the Staff explained in its response to [the Tribe's summary disposition motion], the Staff's Record of Decision, not the FSEIS, is the document with which the Staff concluded its NEPA review."). Powertech also relies heavily on an argument that the PA somehow satisfies NEPA. This argument is based on a falsity. A ROD

is not a NEPA document. Rather, an “environmental document” includes only those documents specified in 40 C.F.R. § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent). 40 C.F.R. § 1508.10. *See Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983) (“[U]nless a document has been publicly circulated and available for public comment, it does not satisfy NEPA’s EIS requirements.”). Neither the ROD nor the PA were made available for public comment as part of the NEPA process.

Thus, the law requires that cultural impact reviews, mitigation measures, and other requirements of NEPA be completed in a NEPA document and finalized and publicly circulated for public comment at the time of the publication of, or in, the Final SEIS. Otherwise, the public has no ability to review these critical components within the context of the NEPA process, only after it is completed. *See also, Village of False Pass v. Watt*, 565 F. Supp. 1123, 1141 (D. Alaska 1983), *aff’d sub nom Village of False Pass v. Clark*, 735 F.2d 605 (9th Cir. 1984) (“The adequacy of the environmental impact statement itself is to be judged solely by the information contained in that document. Documents not incorporated in the environmental impact statement by reference or contained in a supplemental environmental impact statement cannot be used to bolster an inadequate discussion in the environmental impact statement.”); *Dubois v. U.S. Dept. of Agriculture*, 102F.3d1273, 1287 (1stCir. 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 117S. Ct.2510 (1997)(“Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot ‘bring into compliance with NEPA an EIS that by itself is inadequate.’ . . . Because of the importance of NEPA's procedural and informational aspects, if the agency fails to properly circulate the required issues for review by interested parties, then the EIS is insufficient even if the agency's

actual decision was informed and well-reasoned.”) (citations omitted); Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir.1980) (even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot “bring into compliance with NEPA an EIS that by itself is inadequate.”).

NRC Staff’s position that it can finalize substantive portions of a NEPA document after its issuance runs afoul of multiple NEPA requirements. For instance, pursuant to NEPA, the agencies “shall assess and consider comments” and respond in the FEIS by either: modifying alternatives, developing and evaluating alternatives not previously given serious consideration, supplementing or improving its study, making factual corrections, or explaining why the comments do not require a response. 40 C.F.R. § 1503.4(a). In addition, the FEIS should reflect critical views of others to whom copies of the DEIS were provided and respond to opposing views. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989). NEPA requires that, in preparing a final EIS, the agency must discuss “any responsible opposing view which was not adequately discussed in the draft statement and indicate the agency’s response to the issue raised.” 40 C.F.R. § 1502.9. The Council on Environmental Quality interprets this requirement as mandating that an agency respond in a “substantive and meaningful way” to a comment that addresses the adequacy of analysis performed by the agency. *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*.

In the present matter, although the NRC Staff solicited comments from interested tribes on the draft PA, the general public which includes the tribe’s membership was not provided with that important opportunity, as the PA was not finalized until after the publication of the FSEIS. Further, although the Oglala Sioux Tribe and the Standing Rock Sioux Tribe both provided direct substantive comments highly critical of the draft PA, NRC Staff neglected to respond to

those substantive comments, or indeed to make any changes to the PA based on these comments. *See Ex. NRC-016.* This lack of meaningful opportunity to participate is not compliant with the letter or spirit of NEPA, and thus the PA process cannot be considered a NEPA process.

Lastly, NRC Staff argues that despite the lack of adequate information in the FSEIS, “neither NHPA nor NEPA required the Staff to obtain all possible information on historic resources before reaching a decision on Powertech’s application.” NRC Staff Opening Statement at 19. This argument severely overstates the Tribe’s argument. The Tribe does not argue that NRC Staff must obtain “all possible information.” Rather, the Tribe argues that the NEPA process was conducted by an NRC Staff ill equipped to independently survey cultural resources and resulted in an FSEIS that lacked any explanation of a methodology and that excluded participation by the tribal entities that were equipped with the necessary knowledge.

The stated positions of Powertech and NRC Staff confirm that the FSEIS does not contain a NEPA-compliant disclosure and analysis of the cultural resources at stake. Attempts to remedy the NEPA violations through hearing testimony and arguments based on post-FSEIS documents and promises of future compliance cannot satisfy NRC’s NEPA duties.

Contention 1B: Failure to Involve or Consult All Interested Tribes as Required by Federal Law.

As discussed in the Tribe’s Opening Statement, Contention 1B deals with the NRC Staff’s failure to comply with the NHPA, and implementing regulations before issuing the license. While both NRC Staff and Powertech recognize the applicable “reasonable and good faith effort” standard inherent in the NHPA, both parties fail to demonstrate that the NRC Staff has met this standard in this case.

For Powertech’s part, the company provides in its Opening Statement a misguided, two-page defense that fails to address any of the substance of the Tribe’s Contention 1B arguments.

Instead of addressing the substance of the Tribe's allegations of a lack of compliance with NHPA, Powertech ignores the diverse and varied cultural history of North American tribes by focusing merely on the number of tribes that were made away of the project by NRC Staff. Powertech Opening Statement at 37-38. However, Powertech provides no support for the dubious proposition that NRC Staff can achieve compliance with the NHPA merely based on the number of tribes contacted. As a catch-all, Powertech also asserts that any and all other concerns identified by the Oglala Sioux Tribe are rendered moot by the development and execution of a Programmatic Agreement pertaining to the Section 106 process. This argument also lacks any citation to any authority and ignores the Tribe's stated objections to the Programmatic Agreement.

NRC Staff more properly characterizes the Tribe's argument when it states that "Intervenors further claim that the Staff did not make a good faith attempt to obtain information of cultural resources from consulting tribes." NRC Staff Opening Brief at 22.⁷ NRC Staff relies for this argument on what it touts as "a 17-page table that captures many of the Staff's consultation efforts." *Id.* at 23. However, this table provides little substantive information, and includes simply a list of letters and communications sent from and to NRC Staff regarding the Section 106 process. NRC Staff cannot demonstrate the necessary "reasonable and good faith efforts" standard simply by listing the number of times the agency interacted with interested

⁷ Notably, NRC Staff repeats the fallacy carried forward from Contention 1A that it complied with NEPA because "the Record of Decision for the Dewey-Burdock Project, not the FSEIS, is the document with which the Staff concluded its NEPA review. Accordingly, the Staff completed its NHPA review while its NEPA review remained open, and the Staff took into account the findings and mitigation measures described in the Programmatic Agreement when reaching its decision under NEPA." NRC Staff Opening Statement at 22. However, as discussed, a ROD is not a NEPA document – rather, the Staff's analysis of impacts stands or falls on the information in the FSEIS – later documents, not subject to public review and subject to the critical NEPA review framework do not suffice. *See*, caselaw cited *supra*, at 11.

tribes on a project, without regard to the substance of those interactions. The Tribe instead contends that the substance of these efforts has failed to meet the NHPA standard.

As discussed in the Tribe's Opening Statement, the gravamen of the Tribe's argument is that the consultation with the Tribe has not been meaningful or reasonable because the NRC Staff has refused throughout its consultation process to work through serious problems identified by the Oglala Sioux Tribe and its representatives, along with the other tribes. These problems center on the NRC Staff decision to abandon its attempts to secure a defensible cultural resources survey of the project area that included tribal representatives, despite express NRC Staff commitments to do so. These problems were exacerbated and reinforced by NRC Staff's refusal to engage in a meaningful effort to resolve the substantial criticisms various tribes, including the Oglala Sioux Tribe, leveled at the proposals for various tribes to conduct their own surveys of the site.

Lastly, NRC Staff ignored the problems identified by the various tribes regarding the terms of the Programmatic Agreement, pushing it through to final without resolving these problems. NRC Staff did succeed in gaining the approval of several non-tribal entities, which resulted in an agreement where not a single tribe opted to sign on the final version – a fact that severely undermines NRC Staff's and Powertech's reliance on the PA as a successful resolution to the NHPA Section 106 consultation process. Instead of equipping itself with the resources necessary to gain a government-to-government resolution among all the relevant federal, tribal, and state governments, NRC Staff relegated the tribes to the role of interested parties and went forward based on the post-licensing process outlined in the highly disputed PA.

As detailed in the Tribe's Opening Statement, the problems with the NRC Staff's proposed cultural resources survey are described in email and letter correspondence between

affected Tribes and the NRC Staff (*see* communications regarding NEPA and NHPA compliance)(Exhibit OST-11, pages 272-325). These letters to NRC Staff come from the Standing Rock Sioux Tribe (pages 272-277), the Sisseton Wahpeton Oyate (pages 280-281), the Rosebud Sioux Tribe (pages 288-293), and the Yankton Sioux Tribe (page 294). Remarkably, each of these letters details the legitimate objections these Tribal historic preservation officers had to the proposed NRC Staff scientific methodology in conducting the necessary cultural resource impact survey of the proposed mine site.

The Standing Rock Sioux Tribe's highly detailed letter specifically identifies objections targeting the geographic scope of the NRC Staff proposed surveys (only a small portion of the project area), as well as the scope of the impacts to be considered (direct impacts vs. indirect impacts), the timing of the survey, the resources available for Tribal participation, the selection process for the survey contractor, and the protocols for identifying sites and gauging their significance. Despite these objections, the tribes committed to working with NRC Staff and the Applicant in good faith, if only NRC Staff and the Applicant would assure a meaningful process and credible methodology. Unfortunately, NRC Staff abandoned this effort a short time later and instead went forward with a survey method that lacked any organized or scientifically determined methodology. FSEIS at 1-23 to 24; Exhibit NRC-008-A. This demonstrates a lack of good faith and reasonable consultation under the NHPA. Choosing to finalize the PA based on all non-tribal signatories also demonstrates that NRC has not satisfied the federal trust responsibility as it applies to tribes generally, and the Oglala Sioux Tribe in particular.

Once NRC Staff abandoned its stated commitment to conduct a meaningful cultural resources survey with tribal involvement, NRC Staff instead moved forward with a plan to allow tribes to conduct their own reviews, but without any specified controls or methodology. Serious

concerns about this new process were raised to NRC Staff by the Standing Rock Sioux Tribe, but never addressed. *See* Ex. OST-016, February 20, 2013 letter from Standing Rock Sioux Tribe to NRC Staff. In this letter, the Standing Rock Sioux Tribe specifically objected to the lack of any identifiable methodology for this new approach:

According to your current proposal to the tribes, you would ask various archaeological companies (up to 23 based on current consulting tribes to keep things fair and balanced) to accept a ten thousand dollar honorarium to each send (sic) up to three representatives to walk around the proposed undertakings license boundary for anywhere from one day to thirty days. There would be no specific methodology as to what was needed to be recorded or how and with no direction or real accountability as to how they conduct themselves in the field or where they conduct their field studies. The only requirement is that they submit a written report of what they found to NRC and somehow that will fulfill the identification efforts per 36CFR800.4. This would, in no way, shape or form fulfill the responsibilities for identification for archaeological sites within the Section 106 process.

[...]

The current proposal was issued with no tribal input that I am aware of.

Id. at 2. The letter goes on to object to additional aspects of this new plan, including inadequate available financial resources and overall, a lack of adequate involvement by NRC Staff of tribal representatives in a meaningful survey plan as required by the NHPA regulations. In other words, NRC was not equipped to carry out its NHPA duties, and refused requests to take steps to acquire the necessary resources.

The Oglala Sioux Tribe sent a similar letter to NRC Staff dated March 22, 2013. Ex. OST-017 (March 22, 2013 letter from President Bryan V. Brewer to Kevin Hsueh). In this letter the Tribe specifically objects to the “scope of the work methodology, limited costs and rudimentary cultural sensitivity and awareness on behalf of NRC, direct and indirect effects on cultural resources and historical burial grounds, and privacy concerns for intellectual property.”

Id. at 1. The Tribe further objected to the expedited timeline for the survey. Id. at 2. Despite these substantive and well-supported objections from both the Oglala Sioux Tribe and the

Standing Rock Sioux Tribe, NRC Staff not only pushed forward with the plan leaving these concerns wholly unaddressed, but failed to even give the Tribe the dignity of any response. Ex. NRC-015 at 13.

More recently, Oglala Sioux Tribe President Bryan Brewer and the Standing Rock Sioux Tribal Historic Preservation Officer again described at length the problems they have encountered with a lack of adequate consultation and lack of meaningful review of cultural resources in the ongoing NHPA process, and specifically objected to the terms of the Programmatic Agreement. *See* Exhibit NRC-016. In this letter, the Tribe identifies specific terms in the Agreement that fail to provide any detail or specificity as to future analyses of the project area, methodologies proposed for these analyses, or what mitigation measures may be adopted in the future to address the impacts. *Id.* at 2. The Standing Rock Sioux Tribe raises similar concerns, but goes into highly specific detail, offering not only a letter describing their frustration in dealing with the NRC Staff on this issue, but also providing multiple substantive line by line comments, questions, and critiques to the Agreement. *Id.* at 7-20. As with the input on the survey approaches discussed above, NRC Staff did not provide any specific substantive response to either set of tribal concerns, nor did NRC Staff incorporate the changes proposed by either tribe. Ex. NRC-015 at 16. *Compare* draft Programmatic Agreement commented on by Standing Rock Sioux Tribe (Ex. NRC-016 at 7-20) with Final Programmatic Agreement (Ex. NRC-018-A). Instead, NRC Staff and Powertech pushed to finalize the PA without addressing the tribes' concerns.

As this detailed timeline with specific examples in the record makes abundantly clear, the problems with NRC Staff's consultation under the NHPA are a significant issue and reveal that NRC Staff has not carried out its agency responsibilities in a manner that fulfills its duty to make

a “reasonable and good faith effort” in consultation. The record instead demonstrates a one-sided debate, where the Tribe’s concerns go unheeded, unaddressed, and even wholly unresponded to. As such, NRC Staff’s scheme contravenes the requirements of the NHPA, despite the attempts in NRC Staff’s and Powertech’s Opening Statements and testimony.

This result unlawfully harms the Tribe’s ability to participate in the identification of historic/cultural properties, and hampers its ability to effectively participate at the later stage when the specific impacts from a particular project are analyzed. *See, e.g.*, 36 C.F.R. §§ 800.4 (“Identification of historic properties”) and 800.5 (“Assessment of adverse effects”). NRC Staff’s post-licensing NHPA scheme also diminishes and disregards the federal government’s trust obligations to the Tribe.

Contention 2: Failure to Include Necessary Information for Adequate Determination of Baseline

As detailed in the Tribe’s Opening Statement and Opening Testimony of Dr. Moran, the FSEIS violates 10 C.F.R. Part 40, Appendix A, Criterion 7, 10 C.F.R. §§ 51.10, 51.70 and 51.71, and the National Environmental Policy Act, and implementing regulations – each requiring a description of the affected environment and impacts to the environment – in that it fails to provide an adequate baseline groundwater characterization or demonstrate that ground water samples were collected in a scientifically defensible manner, using proper sample methodologies.

NRC Staff argues that it need not obtain additional information related to baseline conditions at site apart from that presented in the FSEIS because an EIS is not intended to be a “research document.” NRC Staff Opening Statement at 29-30. Overall for Contention 2, NRC Staff argues that there is no basis under NEPA for the FSEIS to have included any additional information, because what was included was sufficient to assess the impacts associated with the

Dewey-Burdock project. Powertech similarly argues that because the baseline required for pre-licensing by virtue of Criterion 7 is less restrictive than that required by Criterion 5(B)(5) for “Commission-approved background”, NRC Staff has properly deferred collection of any additional baseline data for NRC Staff to conduct post-licensing, non-NEPA characterization and analysis of the affected environment. Powertech Opening Statement at 39-40.

Powertech also relies heavily on testimony from its consultants, Mr. Demuth and Mr. Lawrence, which are little more than misplaced and inaccurate restatements of the of NRC regulations and NEPA requirements coupled with conclusory assertions that the NRC Staff documents “adequately” describe baseline conditions with “reasonably comprehensive” data for the site. *Id.* at 40-42. The legal analysis of Powertech’s testifying consultants, each presumably having played a critical role in preparing Powertech’s application materials, should be disregarded and given no weight. Contrary to these consultants’ legal arguments, NEPA requires both a “hard look” and a scientifically-defensible presentation of baseline conditions. *See* 40 C.F.R. § 1502.24 Methodology and scientific accuracy (“Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.”). Further, Criterion 7 of Appendix A to the NRC Part 40 regulations requires the applicant to provide “**complete** baseline data on a milling site and its environs.” 10 C.F.R. Part 40, Appendix A, criterion 7(emphasis added).

Applying the correct legal standards to the facts of the present case, the expert Rebuttal Testimony of Dr. Robert Moran confirms that NRC Staff has not “adequately” described the baseline conditions at the site using “reasonably comprehensive” data. For instance, Dr. Moran specifically opines that despite NRC Staff and Powertech arguments that post-license collection of data is sufficient to fill in any gaps that currently exist, such a process deprives expert

agencies, the public and the parties to this proceeding (and NRC Staff) the opportunity to meaningfully review and evaluate the impacts from the proposed project in a NEPA process.

Rebuttal Testimony of Dr. Robert E. Moran at 2 (A.2).

Further, Powertech's consultants' assertions that this additional data cannot be obtained without full construction of final well-fields is unsupported and contradicted by the expert testimony of Dr. Moran. Dr. Moran opines that adequate baseline data can be gathered "without obstructing the ultimate wellfield monitoring network." Id. Dr. Moran points to previous studies undertaken by TVA and Knight Piesold that conducted pump tests to gather baseline data prior to NRC approval. Id. Dr. Moran states that Mr. Demuth "confuses hydrological testing that is needed to establish, analyze, and disclose the hydrogeological setting as part of the NEPA-based NRC permit-approval with the more specialized production tests Powertech will conduct on constructed wellfields." Id. In short, there is no legal, technical, or practical basis to forgo gathering this needed data as part of the NEPA process.

Dr. Moran's expert Rebuttal Testimony provides further detail as to the flaws in the NRC Staff and Powertech positions regarding baseline data – which is to defer meaningful collection, disclosure, and analysis until a later date, after other expert agencies, the public, and parties to these proceedings have been denied the opportunity to comment on the baseline that reveals the affected environment that will be impacted.

The Tribe respectfully submits that the Opening Statement and this Rebuttal confirm that NRC Staff's plan to collect, analyze, and disclose baseline data after licensing is complete constitutes a violation of NEPA and/or the NRC regulations and the Tribe respectfully requests that the Board remand the FSEIS for further analysis consistent with NEPA.

Contention 3: Failure to Include An Adequate Hydrogeological Analysis To Assess Potential Impacts to Groundwater

Central to the Tribe's argument with respect to Contention 3 is the fact that the collection of substantial information regarding potential pathways for migration of contaminants at the Dewey-Burdock site is simply deferred until a later time instead of presented in the FSEIS as required by NEPA. Instead of arguing that this data is not necessary to gauge and analyze the potential groundwater impacts, NRC Staff's repeated position in its Opening Statement is that it has included license conditions and extracted commitments from Powertech to supply this information later – after licensing and outside of the NEPA process. The result of NRC Staff's refusal to require necessary information on hydrogeology to be properly collected on the front end of the licensing process is a FSEIS and application material that fails to provide sufficient information regarding the hydrologic and geological setting of the area to meet the requirements of 10 C.F.R. § 40.31(f); 10 C.F.R. § 51.45; 10 C.F.R. § 51.60; 10 C.F.R. §§ 51.10, 51.70 and 51.71, 10 C.F.R. Part 40, Appendix A, Criteria 4(e) and 5G(2), and the National Environmental Policy Act, and implementing regulations.

The remainder of NRC Staff's Opening Statement consists simply of citations to the FSEIS where the agency asserts it has addressed all of the Tribe's arguments with respect to this contention. Similarly, the testimony submitted by NRC Staff is not scientific testimony, but simply recitations of sections of the FSEIS where NRC Staff asserts various items were discussed. NRC Staff's position statement and testimony provide no materially new information. The prior Second Supplemental Declaration submitted by Dr. Moran in support of his expert testimony (Ex. OST-012 at 44-131) addresses in detail, and refutes, each of the NRC Staff positions reasserted in NRC Staff's Opening Statement and via NRC Staff's written testimony.

As to the deferred collection of necessary information, NRC Staff argues that it has complied with NEPA and NRC regulations despite lacking admittedly necessary pump test data that will be collected later via additional pump tests required by License Condition 10.10. NRC Opening Statement at 34. Further, NRC staff argues that NEPA is satisfied with respect to the thousands of unidentified historic boreholes on the site that provide pathways for communication of contamination between aquifers because of “commitments Powertech has made to identify additional features, such as improperly plugged boreholes, that may provide pathways for excursions.” NRC Staff Opening Statement at 37. However, as Dr. Moran testifies throughout his Initial Testimony and in Rebuttal, the deferred information is critical to characterization and analysis of the potential impacts to aquifers at the site. Ex. OST-1 at 16-22. As asserted by the Tribe throughout the NEPA process and in its position statements, NRC Staff’s decision to defer the collection and analysis of this fundamental data by adopting license conditions cannot measure up to NEPA requirements, as without this information, any assessment of potential impacts amounts to guesswork.

As set forth in the Tribe’s Opening Statement, this approach to collect data later also violates 10 C.F.R. Appendix A, Criteria 5G(2), which specifically requires:

detailed information concerning extent, thickness, uniformity, shape, and orientation of underlying strata. Hydraulic gradients and conductivities of the various formations must be determined. This information must be gathered from borings and field survey methods taken within the proposed impoundment area and in surrounding areas where contaminants might migrate to ground water. The information gathered on boreholes must include both geologic and geophysical logs in **sufficient number and degree of sophistication to allow determining significant discontinuities, fractures, and channeled deposits of high hydraulic conductivity.**

10 C.F.R. Appendix A, Criteria 5G(2)(emphasis added). The lack of this data is acknowledged in the FSEIS, where NRC Staff admits that Powertech has not conducted the necessary studies to identify “significant discontinuities, fractures, and channeled deposits.” This issue is addressed

head-on by Dr. Moran in his Opening Testimony, which points out the significant contradictory evidence in the application and the FSEIS. Exhibit OST-1, at 18-22.

Similarly, Dr. Moran's Rebuttal Testimony reinforces this issue, pointing out that Powertech's own witnesses have now contradicted the scientific integrity of the pump test data which form the basis of the FSEIS analysis. Ex. OST-018 at 4. The Powertech consultants also contradict themselves with regard to the impact of the unidentified boreholes, arguing in some places that they may have closed by themselves, but then also that they are open, and that the effect of the boreholes have rendered the existing pump test data suspect. Id. at 3. Further, Dr. Moran affirms that the data currently forming the basis of the NRC Staff's hydrogeological analysis is "inadequate to establish a hydrogeological ... baseline." Id. at 3. Dr. Moran concludes based on an extensive review of the information presented, including conclusions by every other scientist (except Powertech's) that has reviewed the historic pump tests at the site, that the supposed aquitards at the site are indeed leaky. Id. at 6. Dr. Moran goes into extensive detail as to the particular bases for the lack of acceptable industry-standard methodology and assumptions employed by Mr. Demuth in his conclusions (and accepted by NRC Staff) as to the lack of confining ability of the formations at the site. Id. at 6-7.

Dr. Moran's expert testimony in rebuttal to statements made by Mr. Lawrence, Mr. Demuth, and Mr. Fritz buttresses Dr. Moran's Opening Testimony which opines that the overwhelming body of evidence undermines the FSEIS conclusion that the production zone is hydraulically isolated from surrounding aquifers. Ex. OST-001 at 18-19. Further, Dr. Moran confirms numerous potential pathways for groundwater conductivity, including inter-fingering sediments, fractures and faults, breccia pipes and/or collapse structures, and the 4000 to 6000 unidentified exploration boreholes present at the mine site. Id. at 20. Dr. Moran concludes that

“these inconsistencies make clear that Powertech and NRC Staff have failed to define the detailed, long-term hydrogeologic characteristics and behavior of the relevant Dewey-Burdock aquifers and adjacent sediments.” *Id.* Dr. Moran’s testimony confirms that the NRC Staff violated both NEPA and 10 C.F.R. Appendix A, Criteria 5G(2) in granting Powertech’s license request.

The lack of data extends to the lack of analysis of evidence of “fault zones” in the proposed mining area (Exhibit OST-001, p. 20-21) as well as the existence of a “trench” in the potentiometric surface of the Fall River aquifer. *Id.* at 21. Breccia pipe formations and collapse features round out the list of potential migration pathways for which the application and FSEIS fail to address. *Id.* at 21-22. Dr. Moran’s Powerpoint slides and discussion clearly evidence these problems. Ex. OST-005.

Instead of conducting the rigorous scientific review necessary to determine the hydrogeology of the area, as noted by Dr. Moran, NRC Staff’s position effectively seeks the Board’s permission to rewrite NEPA and NRC regulations to allow Powertech to collect this information in the future, after NEPA is complete and after a license is issued, through the use of a Safety and Environmental Review Panel (SERP). FSEIS at 2-18 (NRC-008-A). Despite the strenuous arguments put forth by NRC Staff and Powertech, the Board cannot rewrite the regulations in this proceeding, and on that basis, must conclude that NRC Staff cannot adopt policies that rely on license conditions and future actions as a means to avoid the existing requirement that compliance with NEPA and NRC regulations be achieved before the license issues.

Based on this demonstration, including the forceful rebuttal provided by Dr. Moran, the FSEIS fails to provide an adequate geology and hydrogeology analysis and as a result fails to

adequately analyze the impacts associated with the proposed mine, particularly on groundwater resources.

Contention 4: Failure to Adequately Analyze Ground Water Quantity Impacts

Contention 4 alleges that the FSEIS violates the National Environmental Policy Act by failing to provide an adequate analysis of the ground water quantity impacts of the project. Further, the FSEIS presents conflicting information on ground water consumption such that the water consumption impacts of the project cannot be accurately evaluated. These failings violate 10 C.F.R. §§ 51.10, 51.70 and 51.71, and the National Environmental Policy Act, and implementing regulations.

In simply citing to the portions of the FSEIS NRC Staff believes supports its analysis, as it has done in prior pleadings in this case, the NRC Staff Opening Statement fails to provide any new information or to cite to any additional information not already addressed in Dr. Moran's Second Supplemental Declaration (Ex. OST-012 at 44-131) and Opening Testimony (OST-001). Thus, the Tribe relies on these documents to rebut NRC Staff's argument.

Powertech provides new argument in the form of testimony from Mr. Demuth and Mr. Fritz. Powertech Opening Statement at 46. Dr. Moran addresses the Powertech testimony in detail in his Rebuttal Testimony. Ex. OST-018 at 7-8. Specifically, Dr. Moran rebuts Mr. Demuth's assertion that information related to evaporation rates are irrelevant to an assessment of the water consumption of the project. *Id.* at 7. Further, Dr. Moran contests Mr. Fritz' testimony that the FSEIS contains a water-balance for the site. *Id.* at 7-8. Dr. Moran again opines that a water balance was not included in the FSEIS. *Id.*

As set forth in the Tribe's Opening Statement, the Tribe's argument on this contention is supported by Dr. Moran's Opening Testimony at 26-28. Exhibit OST-001, at 26-28. *See also,*

Exhibit OST-011 at 104 (Moran Suppl. Decl. at ¶21)(“the DSEIS provides imprecise, conflicting information on the volumes of water to be used throughout the various sections of the DSEIS”); ¶¶ 20-32, 37-38, 50-51, 86-91,101; Exhibit OST-010 at 25-28 (Petition to Intervene and Request for Hearing at 25-28); Exhibit OST-011, at 18-20 (List of Contentions on DSEIS at 18-20).

Neither Powertech nor NRC Staff seriously confront the basic premise is that the FSEIS does not provide sufficient information to adequately characterize the groundwater resource and analyze the groundwater quantity impacts. *See* OST-001 at 27 (Moran Opening Written Testimony at 27-28 cited and discussed in the Tribe’s Opening Statement at 26-27). Instead, both argue that only a cursory description is required and that the necessary data can be gathered and analyzed later. Nothing provided by NRC Staff or Powertech alter the conclusion and argument in the Tribe’s Opening Statement that the FSEIS analysis lacks a scientifically-defensible analysis of ground water quantity impacts associated with the proposed project. The Tribe respectfully submits that it has demonstrated that the NRC Staff has issued the license in violation of NEPA and implementing regulations.

Contention 6: Failure to Adequately Describe or Analyze Proposed Mitigation Measures

As discussed in the Tribe’s Opening Statement, the FSEIS prepared by NRC Staff violates 10 C.F.R. §§ 51.10, 51.70 and 51.71, and the National Environmental Policy Act and implementing regulations by failing to include the required discussion of mitigation measures. NRC regulations at 10 C.F.R. §§ 51.10, 51.70, and 51.71 require all SEIS documents to include all analyses required under NEPA, and that compliance with NEPA “be supported by evidence that the necessary environmental analysis have been made.”

With respect to mitigation, NRC Staff confirms that NEPA requires the identification, incorporation, and evaluation of effectiveness of mitigation measures and then argues that the

NEPA-mandated mitigation analysis is found outside of eighteen-page FSEIS Chapter 6, which is titled “Mitigation.” NRC Opening Statement at 42-51. Specifically, NRC Staff argues that while Chapter 6 of the FSEIS provides only a “summary” of the mitigation proposed, Chapters 2, 4, and 7 include the required disclosure and analysis. NRC Staff Opening Statement at 43; *see also* Powertech Opening Statement at 49. However, a close review of NRC Staff’s argument demonstrates that instead of demonstrating the required discussion of mitigation and effectiveness, NRC Staff concedes that Chapter 6 is inadequate and then cherry-picks stand-alone statements out of the FSEIS for some mitigation components. Importantly, NRC Staff is unable to do even that for the litany of issues specifically identified by the Tribe in its Opening Statement. Further, both NRC Staff’s and Powertech’s Opening Statements fail to address many of the mitigation issues in their entirety.

As a result, at best, the FSEIS rests only on “broad generalizations and vague references to mitigation measures” that have been struck down by federal court because they “do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the [agency] is required to provide.” Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1380-81 (9th Cir. 1998). As detailed in the Tribe’s Opening Statement, with substantial supporting caselaw, NRC Staff’s reliance on a future, as-yet unsubmitted and undisclosed mitigation to prevent/mitigate adverse impacts to these resources violates NEPA. *See* 40 C.F.R. § 1502.14(f); 40 C.F.R. § 1502.16(h); 40 C.F.R. §§ 1508.20(a)-(e); 50 C.F.R. 51.14(b).

For instance, NRC Staff cites to statements in the FSEIS dealing only in broad terms with mitigation for air quality (dust), erosion, recreational uses, noise, and visual impacts. NRC Staff Opening Statement at 44-45. These examples primarily include only conclusory statements that

some future mitigation will be designed and implemented. However, NRC Staff fails to identify any competent discussion of specific mitigation for the major issues identified by the Tribe:

- Reliance on the future submission and potential issuance of a National Pollution Discharge Elimination Standards (“NPDES”) permit to specify mitigation measures and best management practices (“BMPs”) to prevent and clean up spills. Exhibit NRC-008-A, FSEIS at 4-57.
- A Fish and Wildlife Service (“FWS”) raptor monitoring and mitigation plan has not been developed despite confirmed raptor activity in the project area. Exhibit NRC-008-A, FSEIS at 4-151 *compare* at 4-91 (“Map of Raptor Nest Locations in the Dewey-Burdock Project Area and Planned Facilities for the Deep Class V Injection Well Disposal Option”).
- FWS permits to avoid and mitigate impacts to Bald Eagles’ use of three existing Bald Eagle nests were not provided by Powertech and were not analyzed by NRC Staff in the FSEIS. Exhibit NRC-008-A, FSEIS at 3-46, 4-88, *accord* Powertech Response to FEIS Contentions at 21 quoting FRN at Vol. 74, No. 175 (September 11, 2009)(asserting Powertech must obtain take permits).
- Ongoing non-NEPA development of mitigation plans for listed species. *Id.* at 21 (“Powertech also is developing mitigation plans for bald eagles and other MBTA-species for each phase of the proposed project based on collaboration with South Dakota Department of Game, Fish, and Parks (SDGFP) and FWS.”).
- Generic reference to working BLM mitigation and reclamation guidelines (BLM, 2012a) that NRC Staff incorporated into the FSEIS without analysis. Exhibit NRC-008-A, FSEIS at 4-80.
- Vaguely referenced and unspecified sound abatement controls. Exhibit NRC-008-A, FSEIS at 4-149.
- Generically referenced mitigation of evaporation pond impacts that are and deferred to later analysis by the Environmental Protection Agencies pursuant to the Clean Air Act’s Hazardous Air Pollution provisions. Exhibit NRC-008-A, Exhibit NRC-008-A, FSEIS 4-248.
- The FSEIS did not examine groundwater mitigation where Powertech excluded such mitigation measures from its proposal. Powertech Response in Opposition to FSEIS Contentions at 15. (“Groundwater restoration mitigation measures” pursuant to 10 CFR Part 40, Appendix A, Criterion 5(B)(5) “are irrelevant in this proceeding and outside the scope of Powertech’s proposed action.”)(emphasis supplied).

- The FSEIS included mitigation measures involving groundwater restoration as within the scope of the action, and instead of analysis, merely assumed that Powertech will comply with NRC regulations. Exhibit NRC-008-A, FSEIS at 4-46.

Oglala Sioux Tribe Opening Statement at 35-36.

With regard to the cultural resources impacts, NRC Staff admits that the FSEIS failed to account for mitigation to these important resources, arguing that “the Staff’s Record of Decision, not the FSEIS, is the document with which the Staff concluded its NEPA review.” NRC Staff Opening Statement at 47. As discussed *supra* in the context of Contention 1A, an agency may not exclude required NEPA analysis from the FSEIS and instead assert that the information is in the ROD.⁸

The extensive caselaw cited herein, and in the Tribe’s Opening Statement, disposes of NRC Staff’s flawed and unsupportable assertions that no legal basis exists for the Tribe’s argument that mitigation must be discussed in a FSEIS in order to comply with NEPA. *See* NRC Staff’s Opening Statement at 48. The same goes for NRC Staff’s assertion that because it gave

⁸ Village of False Pass v. Watt, 565 F. Supp. 1123, 1141 (D. Alaska 1983), *aff’d sub nom Village of False Pass v. Clark*, 735 F.2d 605 (9th Cir. 1984) (“The adequacy of the environmental impact statement itself is to be judged solely by the information contained in that document. Documents not incorporated in the environmental impact statement by reference or contained in a supplemental environmental impact statement cannot be used to bolster an inadequate discussion in the environmental impact statement.”); Dubois v. U.S. Dept. of Agriculture, 102F.3d1273, 1287 (1stCir. 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 117S. Ct.2510 (1997)(“Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot ‘bring into compliance with NEPA an EIS that by itself is inadequate.’ . . . Because of the importance of NEPA’s procedural and informational aspects, if the agency fails to properly circulate the required issues for review by interested parties, then the EIS is insufficient even if the agency’s actual decision was informed and well-reasoned.”) (citations omitted); Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir.1980) (even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot “bring into compliance with NEPA an EIS that by itself is inadequate.”); Massachusetts v. Watt, 716 F.2d 946, 951 (1st Cir. 1983) (“[U]nless a document has been publicly circulated and available for public comment, it does not satisfy NEPA’s EIS requirements.”).

the Tribe an opportunity to comment on the Programmatic Agreement, it satisfied NEPA. Id. As discussed, NEPA has specific requirements for public circulation and inviting comment from potentially interested persons that is not satisfied by NRC Staff's ineffective attempt described above during the NHPA Section 106 process. Even if NRC Staff's PA efforts could satisfy NEPA's public comment mandate, which they cannot, NRC Staff effectively ignored the Tribe's comments on the Programmatic Agreement, including the Tribe's critique that the so-called "mitigation plan" proposed was nothing more than a promise to develop those plans at a later date. Ignoring substantive comments in favor of a plan to develop a mitigation plan at some future date does not provide the required discussion of mitigation and effectiveness required by the NEPA authorities cited herein and in the Tribe's Opening Statement.

Similar to the cultural resource deficiencies, neither NRC Staff nor Powertech marshal any legal basis to justify the FSEIS' repeated reliance on various commitments by the applicant to mitigate impacts by submitting plans in the future as a result of license conditions imposed by NRC Staff. These future plans encompass mitigation for such basic elements as requiring the applicant to conduct hydrogeological characterization and aquifer pumping tests in each wellfield to examine the hydraulic integrity of the Fuson Shale, which separates the Chilson and Fall River aquifers; a commitment from the applicant to locating unknown boreholes or wells identified through aquifer pump testing, and committing to plugging and abandoning historical wells and exploration holes, holes drilled by the applicant and any wells that fail mechanical integrity tests. Exhibit NRC-008-B, FSEIS at E-135 to 136. Indeed, Powertech admits that the planned approach is to conduct studies at a later date, including admissions that future "pump tests are necessary to determine the nature of the subsurface systems." Powertech Opening Statement at 53.

Although Powertech focuses its mitigation discussion on these hydrogeological issues, its Opening Statement fails to identify anywhere in the FSEIS where these issues are addressed, instead relying on its expert testimony in an attempt to rehabilitate the FSEIS. As cited throughout this Rebuttal Statement, however, NEPA requires mitigation measure discussions to appear in a NEPA document. Reliance on a post-NEPA adjudicatory process is insufficient to satisfy NEPA because the opportunity for public notice and comment is past.

Powertech applies the same approach with regard to such things as avian wildlife mitigation – admitting that no such plan exists, and instead of addressing the NEPA caselaw or statutory provisions, argues that NRC Staff “does not require the submission and completion of an actual avian plan.” Powertech Opening Statement at 56. Also as with the hydrogeological issues, Powertech submits testimony purporting to demonstrate the effectiveness of wildlife mitigation that may be developed in the future. *Id.* However, as discussed, this information and analysis must be present in a NEPA document – the DSEIS and FSEIS – and not in the applicant and staff pleadings in a constrained adjudicatory hearing. *See Sierra Club v. Hodel*, 848 F.2d 1068, 1094 (10th Cir. 1988) *citing* 40 C.F.R. §§ 1503.1(a)(4), 1506.6, *overruled in part on other grounds*, *Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

Powertech asserts throughout its mitigation discussion that license conditions requiring that the company identify impacts and mitigation in the future somehow satisfies NEPA. Powertech relies on conclusory statements that NRC’s “performance-based licensing” and license conditions requiring protection of water quality and public health allows mitigation development, disclosure, and analysis in post-licensing and post-NEPA processes. Powertech Opening Statement at 50. No legal support is offered for this position, which is contrary to the basic premise of NEPA – that NEPA compliance take place before decisions are made and

before resources are committed. New York v. NRC, 681 F.3d 471, 476 (D.C. Cir. 2012)(“Under NEPA, each federal agency must prepare an Environmental Impact Statement (‘EIS’) before taking a ‘major Federal action[] significantly affecting the quality of the human environment.’”)(emphasis supplied) *quoting* 42 U.S.C. § 4332(2)(C). Regardless, NRC Staff is not free to disavow and violate NEPA’s requirements through the use of its preferred licensing structure. Put simply NRC Staff cannot rewrite NEPA through clever use of license conditions. While NRC Staff and operators can make performance-based changes to the operations as they move forward, any such changes must comply with NEPA, and in no case does the prospect for future changes and NEPA compliance negate the need to comply with NEPA in the pre-licensing stage, before NRC Staff takes action by issuance of the requested license. New York v. NRC, 681 F.3d 471, 476 (D.C. Cir. 2012).

As argued extensively in the Tribe’s Opening Statement, the FSEIS fails to provide the required detailed analysis of proposed mitigation measures, and on multiple fronts specifically identified by the Tribe, makes no attempt to evaluate the effectiveness of the proposed mitigation. This approach fails to satisfy NEPA and the identified need for mitigation cannot be delayed based on by promises of later NEPA analysis based on license conditions that purport to rewrite NEPA’s timing requirements. New York v. NRC, 681 F.3d 471, 476 (D.C. Cir. 2012) (“[U]nless the risk is ‘remote and speculative,’ the Commission must put the weights on both sides of the scale before it can make a determination.”)(emphasis supplied). Here, Powertech and NRC Staff rely on license conditions that confirm that the mitigation is neither remote nor speculative, and must be addressed in NEPA-compliant environmental documents before the license determination.

Contention 9: Failure to Consider Connected Actions

NRC Staff and Powertech both make short arguments in their Opening Statements with regard to Contention 9. NRC Staff Opening Statement at 51-53; Powertech Opening Statement at 57-60. However, neither NRC Staff nor Powertech demonstrate where or how the FSEIS conducts any analysis on the Class V disposal wells, Class III injection wells or the point source pollution discharges proposed for the Dewey-Burdock project. NRC Staff argues in the most generalized way, at least with respect to Class III wells, that this is the purpose of the entire FSEIS. NRC Staff Opening Statement at 52. However, with regard to Class V disposal wells, NRC Staff simply restates the FSEIS, which defers all analysis to future EPA review. NRC Staff Opening Statement at 52 (“EPA will evaluate the suitability of the proposed deep well injection wells and will only allow deep well injection if the waste fluids can be suitably isolated in a deep aquifer.” *citing* FSEIS at 4-69). NRC does not address any aspect of the South Dakota permitting processes in its Opening Statement.

As a result, nowhere has NRC Staff, in the FSEIS or elsewhere, demonstrated any review of the potential impacts of the deep well injection or the suitability of any aquifer to suitably isolate this waste. Similarly, NRC Staff does not show the necessary review of impacts from surface discharges at the site, instead deferring to the State of South Dakota’s permit review. As discussed in the Tribe’s Opening Statement, NEPA and the NRC implementing regulations require such an analysis under 10 C.F.R. §§ 51.10, 51.70 and 51.71, and the National Environmental Policy Act and implementing regulations before the license issues.

Powertech misapprehends the Tribe’s position by defending NRC Staff’s ability to coordinate with other agencies in the FSEIS process. Powertech Opening Statement at 57. The Tribe does not argue that NRC Staff is not permitted to coordinate with other agencies where the

NRC Staff is actually required to coordinate and cooperate with other agencies. Instead, the Tribe's position is that NRC Staff is not permitted to simply defer analysis of impacts from such things as deep aquifer disposal of waste and surface discharges of waste simply because another agency has permitting authority over those processes. This is particularly true, as here, where those agencies are not subject to NEPA for purposes of evaluating those permits.

Powertech further relies on the testimony of Mr. Fritz, but only "to identify the locations in the FSEIS where EPA's involvement in the license application review process is identified and/or described." Powertech Opening Statement at 58. This defense fails to show how or where the FSEIS evaluated the potential impacts associated with these waste disposal options. Instead, the opposite is true: the FSEIS failed to review the potential impacts associated with these disposal plans and simply stated that EPA and/or South Dakota would be evaluating a permit, and providing no NEPA review or analyses.

As laid out in the Tribe's Opening Statement, the FSEIS repeatedly relies upon not-yet-existent EPA analyses and assumes EPA will require appropriate mitigation measures to lessen impacts, and uses those permitting processes to simply defer analysis of impacts to EPA. In making its determination that impacts from the use of Class V underground waste injection wells is "small", the FSEIS presumes that at some later date "EPA will evaluate the suitability of the formations proposed for Class V well injection. Class V injection disposal will be allowed only when the applicant demonstrates liquid waste can be isolated safely in a deep aquifer." Exhibit NRC-008-A, FSEIS at 4-34. See also FSEIS at 4-45 ("EPA will evaluate the suitability of the formations proposed for Class V well injection."), 4-69, 5-27, 5-33 to 34 (all relying without analysis on EPA's UIC Class V permitting). NRC similarly defers to not-yet-existent future EPA analysis related to the UIC Class III well permitting process, future EPA consideration of

Subpart W radon controls, and South Dakota state processes. Exhibit NRC-008-B, FSEIS at 6-6 (relying on EPA review of Class III permit as mitigation); E-71 (“To ensure compliance with 40 CFR Part 61, Subpart W, the applicant may need to acquire an approval from EPA prior to commencing operations in any wellfield. NRC does not have a similar requirement for ISR facilities. However, if NRC were to grant Powertech a license based on the satisfactory compliance of NRC’s regulatory requirements, Powertech is still responsible for obtaining other federal, state, and local permits or approvals, as necessary before commencing operations.”); Exhibit NRC-008-A, FSEIS at 4-42 (“The NPDES permit sets limits on the amount of pollutants entering ephemeral drainages that may be in hydraulic communication with alluvial aquifers at the site. The NPDES permit will also specify mitigation measures and BMPs to prevent and clean up spills. The applicant has not yet submitted an application for an NPDES permit to SDDENR.”); 4-71 (same); 1-26 (“SDDENR would coordinate with SDGFP to mitigate the potential effects of surface impoundments on wildlife; mitigation measures discussed included the use of netting and fencing to protect wildlife and implementing protocols to assess the effects of wastewater constituents on wildlife.”).

The NRC Staff’s position confirms once more that the FSEIS unlawfully relies on EPA and South Dakota permitting processes and improperly seeks to rely on these non-NEPA processes to excuse NRC’s responsibilities to fully review the environmental impacts within the NEPA process. South Fork Band Council v. BLM, 588 F.3d 718, 726 (9th Cir. 2009)(“A non-NEPA document -- let alone one prepared and adopted by a state government -- cannot satisfy a federal agency's obligations under NEPA.”).

Overall, NEPA mandates that the NRC Staff prepare an FSEIS that discloses and analyzes the proposed activities and the potential impacts associated with the other federal and

state permits associated with the project, including any proposal to inject waste underground through an Underground Injection Control permit. *See* 10 C.F.R. § 51.71 (“The environmental impact of the proposed action will be considered in the analysis with respect to matters covered by environmental quality standards and requirements irrespective of whether a certification or license from the appropriate authority has been obtained.”). NRC Staff’s failure to comply with NEPA before issuing the license cannot be excused by reliance on the future efforts and analysis of other state and federal agencies.

CONCLUSION

For the foregoing reasons, neither NRC Staff nor Powertech, through their respective Opening Statements have demonstrated that the FSEIS and Application materials are not in compliance with applicable laws, including NEPA, NHPA, AEA, and their implementing regulations. As a result, the Tribe respectfully requests the Board invalidate the FSEIS, and all action taken on the FSEIS, including the ROD and license, and remand this matter back to the NRC Staff to conduct the necessary analyses to comply with NEPA, the NHPA, the AEA, and implementing regulations.

Respectfully Submitted,

/s/ Jeffrey C. Parsons

Jeffrey C. Parsons
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
303-823-5732
Fax 303-823-5732
wmap@igc.org

Travis E. Stills
Energy and Conservation Law
Managing Attorney

Energy Minerals Law Center
1911 Main Avenue, Suite 238
Durango, Colorado 81301
stills@frontier.net
phone:(970)375-9231
fax: (970)382-0316

Attorneys for Oglala Sioux Tribe

Dated at Lyons, Colorado
this 15th day of July, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | | |
|---|---|------------------------------|
| In the Matter of |) | |
| |) | |
| POWERTECH (USA) INC., |) | Docket No. 40-9075-MLA |
| |) | ASLBP No. 10-898-02-MLA-BD01 |
| (Dewey-Burdock In Situ Uranium Recovery |) | |
| Facility) |) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Statement of Contentions in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 15th day of July 2014, and via email to those parties for which the Board has approved service via email, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by _____

Jeffrey C. Parsons
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
303-823-5732
Fax 303-823-5732
wmap@igc.org